

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000569

Greenville Pharmaceutical Research, Inc., Appellant,

v.

Parham & Smith, LLC and Gerald H. Sokol, M.D., Defendants,

Of whom Gerald H. Sokol, M.D. is the Respondent.

**RESPONDENT'S RETURN TO APPELLANT'S
PETITION FOR REHEARING**

RECEIVED
JAN 22 2018
SC Court of Appeals

T. David Rheney (S.C. Bar # 13148)
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATUTES AND RULES..... iii

STATEMENTS OF ISSUES1

STATEMENT OF THE CASE.....2

ARGUMENT.....4

CONCLUSION7

TABLE OF AUTHORITIES

CASES

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E. 2d 322 (2001).....4

STATUTES AND RULES

Rule 12(b)(6), *SCRCP*2, 3

S.C. Code Ann. §15-79-125 (2005) 2

S.C. Code Ann. §15-39-100 (2005)5

S.C. Code Ann. §15-79-130 (2005)5

STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT APPELLANT FAILED TO STATE A COMMON LAW CAUSE OF ACTION FOR FRAUD?

STATEMENT OF THE CASE

On October 20, 2014, Greenville Pharmaceutical Research, Inc. (hereinafter “Appellant”) filed this lawsuit in the Greenville County Court of Common Pleas, alleging that Dr. Gerald H. Sokol (hereinafter “Respondent”) allegedly fraudulently submitted an affidavit in an underlying medical malpractice lawsuit filed by John Bruce and Marilyn Bruce against Appellant, Alliance Biomedical Research, LLC (hereinafter “Alliance”), Dr. Dyan Desai and North Hills Medical Center. The underlying medical malpractice lawsuit was eventually settled for \$325,000.

Previously, in June 2014, Alliance filed a lawsuit against Respondent and Michael Parham, the attorney for the Bruces in the underlying medical malpractice lawsuit, in the Pickens County Court of Common Pleas. With regard to Respondent, Alliance alleged that in the medical malpractice case he negligently and fraudulently submitted an affidavit in compliance with *S.C. Code Ann. §15-79-125* (2005) to support the claim of the Bruces that the defendants were negligent in their care of him. The allegations of that case mirror the allegations in the underlying lawsuit in this appeal. Respondent filed a Rule 12(b)(6) motion to dismiss, and by order dated October 2, 2014, Judge Steven John dismissed that lawsuit against Respondent both because respondent did not mention Alliance in the affidavit, and because the statutes relating to the expert affidavit in a medical malpractice case do not afford a private right of action by a party against the expert of the opposing party.

After dismissal of the Pickens County case, Appellant then filed this lawsuit in the Greenville County Court of Common Pleas against Respondent and Mr. Parham. The only substantive difference between the lawsuits was that in this lawsuit Appellant only

attempted to assert a cause of action for common-law fraud against Respondent based upon the same affidavit at issue in the Pickens County case. Respondent again filed a Rule 12(b)(6) motion to dismiss. A hearing was held by Judge J. Cordell Maddox in Greenville on February 12, 2015. By order dated February 19, 2015, Judge Maddox granted Respondent's motion to dismiss. Thereafter, Appellant filed a motion for reconsideration, and then an amended motion for reconsideration. On February 10, 2015, Judge Maddox denied Appellant's motion for reconsideration. Thereafter, Appellant filed its notice of appeal, and on December 13, 2017, this Court affirmed the ruling of Judge Maddox. Appellant then filed this petition for rehearing.

ARGUMENT

I. APPELLANT'S PETITION FOR REHEARING IS MERELY A RE-HASH OF ITS ARGUMENTS ON APPEAL AND SHOULD BE REJECTED.

Initially, it appears that Appellant has not moved for reconsideration of that portion of the holding of the Court of Appeals that Appellant's due process rights were not violated by the trial court. While it does mention in its brief that it wishes the Court to reconsider its ruling, it thereafter states that it seeks only a rehearing "on grounds that the opinion appears to have overlooked or misapprehended specific allegations in Appellant's Complaint, which alleged a cause of action for fraud." (Appellant's Brief at p. 2). The remainder of its brief addresses only that portion of this Court's ruling that Appellant had failed to state a common law cause of action for fraud. Therefore, Appellant has waived its "due process" argument. On that basis alone Appellant's petition should be rejected.

Even if Appellant properly reserved its right to petition for rehearing of this Court's ruling that Appellant's due process rights were not violated by the trial court, its failure to address that issue at all in its brief prevents this Court from reconsidering that issue. Nowhere in its brief does Appellant argue that this Court overlooked any facts related to that issue or that it misapprehended the law or the facts related to that issue, as is required under South Carolina law. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001). Accordingly, Appellant's petition for rehearing of that issue, and thus the petition in its entirety, must be denied.

To the extent that Appellant's brief does argue for it properly stated a common-law action for fraud in its complaint, it has merely restated, in toto, the exact same

argument it previously made to this Court in its final brief on appeal. Its brief in support of this motion is nothing more than a near verbatim restatement of that same argument, and fails to point out how this Court misapprehended either the law or the facts as to that at issue. It is merely an attempt to take a second bite of the same apple, and must therefore be rejected.

II. THE COURT OF APPEALS CORRECTLY HELD THAT APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT.

As previously argued, it is Respondent's position that the trial court did not, *sua sponte*, grant Respondent's motion to dismiss based on a theory of witness immunity not argued by Respondent as a basis for that motion. Respondent's position has been from the start that Appellant has no private cause of action against Respondent, who was an expert witness for the opposing party in the underlying medical malpractice case. The statutes requiring submission of an affidavit from an expert prior to the filing of a medical malpractice lawsuit control the underlying medical malpractice lawsuit, and thus the underlying lawsuit in this case. Based on those statutes, to the extent that Respondent's affidavit was defective in any substantive way, Appellant's remedy was to file a motion to dismiss the medical malpractice lawsuit based upon the alleged defects, and therefore the failure to state a claim against it. *S.C. Code Ann.* §15-39-100(E) (2005). Alternatively, if indeed the affidavit was offered in bad faith and without a reasonable basis in fact, or if Respondent otherwise acted unethically, the remedy was for the trial judge in the underlying medical malpractice lawsuit to report Respondent to the licensing entity in his state which regulates his profession. *S.C. Code Ann.* §15-79-130 (2005).

There is no private cause of action afforded Appellant against Respondent under the statutory scheme which controls the affidavit in question. In effect, therefore, Respondent is immune from liability to Appellant, and the trial court correctly granted Respondent's motion to dismiss the underlying lawsuit.

Even if Judge Maddox did, *sua sponte*, grant Respondent's motion to dismiss on the basis that Respondent, as an expert for the opposing party in the underlying medical malpractice lawsuit, is immune from liability to Appellant, this Court's holding that Appellant's due process rights were not violated is correct. As noted by this Court in its opinion affirming Judge Maddox, the lack of a private cause of action available to Appellant rendered Respondent immune to liability to Appellant. Appellant was given multiple opportunities to argue for the existence of a private cause of action against Respondent, both at the initial hearing of Respondent's motion to dismiss and in its motion for reconsideration of the trial court's ruling granting the motion to dismiss. Each time it failed to make such an argument. In fact, to date Appellant has yet to enunciate any argument at all that it has a private cause of action against Respondent and/pr that Respondent should not be immune to liability to it. Accordingly, Appellant's due process rights were not violated and its petition for rehearing must be denied.

III. THE COURT OF APPEALS CORRECTLY HELD THAT APPELLANT FAILED TO STATE A COMMON LAW CAUSE OF ACTION FOR FRAUD.

As Respondent has argued from the outset, Appellant failed to properly set out the nine elements of fraud required to be pled in the complaint, and failed to plead facts in support of those elements of fraud with particularity. Specifically, Appellant failed to

allege that a false representation was made by Respondent to it, no doubt because no representation was ever made by Respondent to it. In addition, Appellant failed to allege that it relied upon the truth of the allegedly false representation by Respondent and that it took some action based upon that allegedly false representation to its detriment or injury. Indeed, and as noted previously, Appellant settled the underlying medical malpractice lawsuit for \$325,000, rather than either taking the case to trial or, apparently, moving to dismiss that lawsuit based upon alleged defects in Respondent's affidavit. And, as noted by this Court in its holding, Appellant failed to allege the false representation(s) related to matters of fact, as opposed to Respondent's mere expressions of opinion. Instead, and as specifically stated by Respondent in his affidavit, and as also acknowledged by Appellant in paragraph 24 of its complaint, the statements in the affidavit were Respondent's opinions of the negligence of the defendants in the underlying medical malpractice lawsuit which caused injury to the Bruces. As such, Appellant failed to state a cause of action based upon common law fraud and both the trial court and this Court were correct in so holding.

CONCLUSION

For the reasons set forth above, Appellant's petition for rehearing of this Court's affirmation of the trial court's granting of respondent's motion to dismiss should be rejected.



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January 19, 2018

THE STATE OF SOUTH CAROLINA

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J. Cordell Maddox, Jr., Circuit Judge

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with the **Respondent's Return to Appellant's Petition for Rehearing** by mailing a copy of the same by United States Mail with first class postage prepaid to the following:

F. Milton Mann, Jr., Esq.
151 Harold Fleming Court
Spartanburg, SC 29303

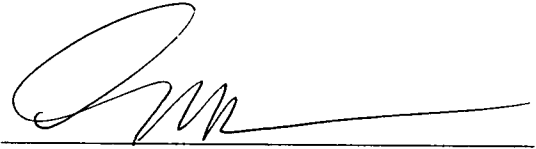
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(Signature on following page)

January 19, 2018

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a long horizontal line extending to the right.

Mary Beth Morgan



Complex experience for complex matters January 19, 2018

T. DAVID RHENEY
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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: *Greenville Pharmaceutical Research, Inc., Appellant, v. Parham & Smith, LLC and Gerald H. Sokol, M.D., Defendants, of whom, Gerald H. Sokol, M.D. is the Respondent*
Appellate Case No.: 2016-000569

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and six copies of Respondent's Return to Appellant's Petition for Rehearing. Also enclosed are the original and three copies of a Proof of Service for the same. We would appreciate your filing these documents with the Court of Appeals and returning the extra stamped copies to us in the enclosed, stamped envelope.


By copy of this letter, we are serving Plaintiff's counsel with copies of these documents.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

With kind personal regards, we are

Very truly yours,

GALLIVAN, WHITE AND BOYD, P.A.



T. David Rheney
Direct Dial: (864) 241-7001

TDR/mbm
Enclosures

cc: F. Milton Mann, Jr., Esq.
Jeffrey M. Bogdan, Esq.
M. Dawes Cooke, Jr., Esq.
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